Poland Processing Company *and* United Mine Workers of America, AFL–CIO. Case 6–CA–24825

February 18, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

A charge was filed by United Mine Workers of America, AFL–CIO (the Union) on August 27, 1992. On September 25, 1992, the General Counsel of the National Labor Relations Board issued a complaint against Poland Processing Company (the Respondent), alleging that it violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally discontinuing health and retirement fund contributions, remittances to the Union of union dues and assessments, selective strike fund contributions, training and education fund contributions, and contractually required wage payments. On October 13, 1992, the Respondent filed its answer to the complaint, admitting that it discontinued the above-described payments, but asserting that it did so because ''exigent business circumstances have prevented Respondent from meeting all of its obligations under the terms of the Collective Bargaining Agreement'' with the Union. The Respondent denies that its conduct constitutes an unlawful refusal to bargain in good faith.

On November 18, 1992, the General Counsel filed with the Board a Motion for Summary Judgment, asserting that the Respondent's answer to the complaint admits the allegations that it discontinued the above-described payments, that these subjects are mandatory subjects for the purpose of collective bargaining, and that the Respondent discontinued the above-described payments without the consent of the Union. The General Counsel maintains that these allegations should be deemed by the Board to be admitted and that the Board should find these allegations, as well as all other allegations in the complaint, to be true. On November 20, 1992, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On December 4, 1992, the Respondent filed a response (with attached affidavit) to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint and its response to the Notice to Show Cause, the Respondent admits that it failed to make the above-described contractually required payments without the Union's consent. The Respondent asserts that financial conditions beyond its control have prevented it from meeting its financial obligations. The Respondent asserts that its sole customer for which it processes coal has stopped producing coal and is now in bankruptcy. The Respondent maintains that it has been shut down since approximately July 1992.

It is well established that Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by the agreement without obtaining the consent of the union.[1] Here, the Respondent has admitted that it unilaterally failed and refused to make benefit fund, dues, and wage payments. Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint. The Respondent's claim that it is financially unable to make the required payments does not constitute an adequate defense to an allegation that an employer has violated Section 8(a)(5) and (1) and Section 8(d) of the Act by failing to abide by a provision of a collective-bargaining agreement. *General Split Corp.*, 284 NLRB 418 (1987). Likewise, the Respondent's claim that it has been ready and willing to discuss its contractual obligations with the Union is not a viable defense to the unilateral midterm modification of a collective-bargaining agreement. *Zimmerman Painting & Decorating*, 302 NLRB 856 (1991). There being no material facts in dispute, we grant the General Counsel's Motion for Summary Judgment.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Dilliner, Pennsylvania, is engaged in the business of processing coal. During the 12-month period ending July 31, 1992, in the course and conduct of its business operations, the Respondent provided services valued in excess of $50,000 for various business enterprises within the Commonwealth of Pennsylvania, including Shannopin Mining Company, which are enterprises directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] E.g., *Rapid Fur Dressing*, 278 NLRB 905 (1986); *Nestle Co.*, 251 NLRB 1023 (1980); *Pere Marquette Park Lodge*, 237 NLRB 855 (1978).

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit*

At all times material, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the Respondent's employees as described in the National Bituminous Coal Wage Agreement of 1988 (the unit), and has been recognized as such by the Respondent. The unit is a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act. Recognition is embodied in a collective-bargaining agreement which is effective by its terms for the period February 1, 1988, to February 1, 1993.

B. *The 8(a)(5) and (1) Violations*

On or about May 7, 1992, the Respondent, without obtaining the Union's consent, unilaterally discontinued contractually required health and retirement fund contributions. On or about June 20, 1992, the Respondent, without the Union's consent, unilaterally discontinued certain contractually required payments, including, but not limited to, remittances of union dues and assessments, selective strike fund contributions, training and education fund contributions, and wage payments. The terms and conditions of the agreement the Respondent has failed to continue in full force and effect are mandatory subjects of bargaining.

Accordingly, we find that the Respondent has failed and refused to bargain collectively and in good faith with the Union as the exclusive representative of its employees, and that the Respondent has thereby engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act. *Homestead Electric Co*., 306 NLRB No. 149 (Mar. 25, 1992) (not printed in bound volumes).[2]

CONCLUSION OF LAW

By refusing to bargain with the Union by unilaterally discontinuing health and retirement fund contributions, remittances of union dues and assessments, selective strike fund contributions, training and education fund contributions, and wage payments, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to bargain with the Union. We shall also order the Respondent to make the contractually required health and retirement fund contributions, selective strike fund contributions, and training and education fund payments with any additional amounts due computed in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, we shall also order the Respondent to make its employees whole for any losses they may have suffered because of its failure to make payments into the various fringe benefit funds, in accord with *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981); to remit to the Union all dues and assessments not previously remitted; and to make whole employees for any loss of earnings and other benefits resulting from the discontinuing of wage and any other payments in accord with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). All payments to employees and the Union shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because it appears from the record that the Respondent may have ceased operations, we shall also provide for mail notices to employees.

ORDER

The National Labor Relations Board orders that the Respondent, Poland Processing Company, Dilliner, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with United Mine Workers of America, AFL–CIO, by unilaterally discontinuing health and retirement fund contributions, remittances of union dues and assessments, selective strike fund contributions, training and education fund contributions, and wage payments.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of its employees as described in the National Bituminous Coal Wage Agreement of 1988, which is effective by its terms for the period February 1, 1988, to February 1, 1993.

(b) Make the contractually required health and retirement fund contributions, selective strike fund contributions, and training and education fund payments, as specified in the remedy section of this decision.

(c) Make its employees whole for any losses they may have suffered because of the Respondent's failure

[2] Member Oviatt disagrees with the majority for the reasons set forth in his dissent in *Zimmerman Painting & Decorating*, supra. He finds that under the facts of this case, the Respondent's actions constitute only a breach of the parties' contract and not a repudiation of the contract and thus is not a violation of the Act.

to make payments into the various fringe benefit funds, in the manner set forth in the remedy section of this decision.

(d) Remit to the Union all dues and assessments not previously remitted, with interest thereon as specified in the remedy section of this decision.

(e) Make whole its employees for any loss of earnings and other benefits resulting from the discontinuance of wage and any other payments, in the manner set forth in the remedy section of this decision.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Dilliner, Pennsylvania, and mail to unit employees, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with United Mine Workers of America, AFL–CIO, by unilaterally discontinuing health and retirement fund contributions, remittances of union dues and assessments, selective strike fund contributions, training and education fund contributions, and wage payments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of our employees. The unit consists of our employees as described in the National Bituminous Coal Wage Agreement of 1988.

WE WILL make the contractually required health and retirement fund contributions, selective strike fund contributions, and training and education fund contributions, and WE WILL make our employees whole for any losses they may have suffered because those payments were discontinued, with interest.

WE WILL remit to the Union all dues and assessments not previously remitted, with interest.

WE WILL make our employees whole for any loss of earnings and other benefits resulting form the discontinuation of wage and any other payments, with interest.

POLAND PROCESSING COMPANY